

MILITARY COMMISSION

UNITED STATES OF AMERICA

v.

**IHRAHM AHMED MOHMOUD
al QOSI**

**RULING: P-010
GOVERNMENT MOTION
TO AMEND CHARGES**

Dated: 3 December 2009

On 24 November 2009, the Government filed a Notice to Amend Charges. On 2 December 2009, the Government orally presented this Motion, providing the Commission and Defense with the proposed Amended Charges (AE 49). All documents submitted to the Commission, as well as arguments presented by both sides, were considered in making the following finding.

FACTS

1. On 8 February 2008, two charges, each consisting of a single specification, were originally sworn against the Accused alleging conspiracy and providing material support for terrorism. The offenses were referred by the Convening Authority on 5 March 2008, under the authority of the Military Commissions Act of 2006.
2. The Accused was arraigned on these charges on 10 April 2008. Since then, the Commission has convened sessions on numerous occasions, including 22 May 2008, 23 July 2008, 19 November 2008, 15 July 2009, 21 October 2009 and 2 December 2009, the last session being in accordance with the Military Commissions Act (MCA) of 2009.
3. As reflected in the proposed changes, the Government seeks permission to amend the charges as follows:
 - a. Delete “alien unlawful enemy combatant” and substitute “unprivileged enemy belligerent;”
 - b. Amend the acts alleged in paragraphs a through i of the original Charge I, Conspiracy, to those in paragraphs a through l of AE 49; and
 - c. Expand the time frame for the acts alleged in Charge I, Conspiracy, and Charge II, Providing Material Support for Terrorism, by four years, that is, from 1996 to 1992.

LAW AND DISCUSSION

4. The MCA of 2009, 10 U.S.C. § 1804(c), CHARGES AND SPECIFICATIONS, states, in pertinent part:

“SEC. 1804. PROCEEDINGS UNDER PRIOR STATUTE

—Notwithstanding the amendment made by section 1802—

(1) any charges or specifications sworn or referred pursuant to chapter 47A of title 10, United States Code (as such chapter was in effect on the day before the date of the enactment of this Act), shall be deemed to have been sworn or referred pursuant to chapter 47A of title 10, United States Code (as amended by section 1802); and

(2) any charges or specifications described in paragraph (1) may be amended, without prejudice, as needed to properly allege jurisdiction under chapter 47A of title 10, United States Code (as so amended), and crimes triable under such chapter.”

5. This is an issue of first impression for Military Commissions. However, under the guidance provided by 10 U.S.C. § 948b(c), while the Uniform Code of Military Justice (UCMJ) does not, by its terms, apply to trial by military commission, the procedures for military commission are based upon the procedures applicable to general courts-martial and may be used as reference. The Commission notes that the Rules for Courts-Martial (RCM) and the 2006 Rules for Military Commission (RCM), which is not likely to substantially change even if amended in accordance with the MCA of 2009, are substantially identical regarding changes to charges and specifications.

6. Under both RMC 603 and RCM 603, changes to referred charges are considered as either “minor” or “major.” RMC 603 states: “Minor changes in charges and specifications are any except those which add a party, offenses or substantial matter not fairly included in those previously preferred or which are likely to mislead the accused as to the offenses charged.”

7. The discussion accompanying the RMC 603(a) adds clarity by stating that:

“Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors. Minor charges also include those which reduce the seriousness of an offense, as when the value of an allegedly stolen item in a larceny specification is reduced, or when a desertion specification is amended to allege only unauthorized absence.”

8. In contrast RMC 603(d) directs that major changes may not be made over the objection of the accused unless the charges are withdrawn and re-referred. RCM 603 directs that changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification is preferred anew. The Defense has objected to the amendments proposed by the Government.

9. Each of the Government's proposed amendments must be addressed separately as their impact differs. The MCA of 2009, 10 U.S.C. § 948c, states that any alien unprivileged enemy belligerent is subject to trial by military commission. Thus, the substitution of the term "unprivileged enemy belligerent" for "alien unlawful enemy combatant" is clearly jurisdictional in nature and directly authorized by the MCA of 2009. As a matter of note, the jurisdictional language and the proposed change in this regard, under the normal charging practices of the UCMJ, this change would be considered "minor" in nature.

10. However, the proposed amendments to the overt acts alleged in Charge I are more troubling in nature as the four-year expansion of time and addition of overt acts dramatically changes the nature of the offense alleged. When considering the distinction between "minor" and "major" amendments to charges and specifications, the military appellate system has focused on a two-pronged test used by our federal system. (see US v Sullivan, 42 M.J. 360; 1995 CAAF LEXIS 87; US v Moreno, 46 M.J. 216; 1997 CAAF LEXIS 1372; and US v. Smith, 49 M.J. 269; 1998 CAAF LEXIS). Essentially, amendment is permitted if no new or additional offenses are charged and if the substantial rights of the accused are not prejudiced. As to the second test, *Sullivan* sets out the proposition that what must be avoided is denying the accused a chance to effectively defend himself by failing to provide notice of the charges he is facing.

11. In the case at hand, trial preparation has ongoing for almost 2 years, numerous motions have been filed and numerous sessions have been held based on the charges referred in February 2008. In contrast, the Government now proposes expanding the time frame of the offenses alleged from five years (1996-2001) to nine years (1992-2001), as well as the general substance of the overt acts alleged in Charge I. While the basic elements of the offense conspiracy does not change, nor is a greater punishment possible, the scope of the crimes the Accused must defend against will have shifted dramatically. The Government does not seek to "correct a slight error" with these amendments, rather, it seeks to fundamentally alter the charges against the Accused. Therefore, the proposed changes, in regards to the overt acts alleged, is a major change which cannot be made over the objection of the Accused at this point in the proceedings.

CONCLUSION

12. The proposed deletion of the words "alien unlawful enemy combatant" and substitution of the words "unprivileged enemy belligerent" in each charge is specifically authorized under the MCA of 2009 and is not only a minor change but also one needed to properly allege jurisdiction. It is, therefore, allowed.

13. However, the changes proposed by the Government in regards to the overt acts alleged in Charge I and the time periods alleged in Charge I and Charge II are essentially new and additional offenses and contain substantial matters not fairly included in those previously referred. Additionally, significantly changing the charges and specifications at this juncture at this point in the Commission process brings unfair surprise to the Accused.

WHEREFORE, based on the above, the Government's motion to amend the charges is granted, in part only. The government may amend the charges and specifications by changing the jurisdictional basis for the charges from "alien unlawful enemy combatant" to "alien unprivileged enemy belligerent." All other proposed amendments are denied.

A handwritten signature in black ink that reads "Nancy J. Paul". The signature is written in a cursive, flowing style.

NANCY J. PAUL, Lt Col, USAF
Military Judge